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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,

v.

RICHARD THORNBURGH, ATTORNEY GENERAL OF THE
UNITED STATES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

**BRIEF FOR THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY**

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This brief *amicus curiae* is filed with the consent of
 the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 90 national and international unions with a total membership of approximately 13,500,000 working men and women.

The local unions directly affected by this case—locals that are affiliates of member unions of the AFL-CIO—urged the Attorney General to approve the joint operating arrangement at issue here. Nothing we do in this brief is intended to be in conflict with or to put into question the positions taken by these local unions. This brief is not intended to urge a contrary outcome.

The petition in this case presents two questions for review. The first implicates the general question of the judicial deference due to agency decisions respecting the limits of the agency's statutory authority. That question may have ramifications far beyond the four corners of this case. The AFL-CIO, which has a significant interest in the principles governing judicial review of agency determinations, submits this brief solely to address this first issue.

The second issue presented is limited to interpretation of the Newspaper Preservation Act. On that issue, this brief takes no position.

INTRODUCTION AND SUMMARY OF ARGUMENT

We do not submit this brief to urge a particular outcome in this case.¹ Rather, we address solely an issue that is implicated at the threshold of analysis of the first question presented by petitioners: whether any deference should be given to the Attorney General's interpretation of the statutory language here at issue.

The Newspaper Preservation Act does *not* grant the Attorney General unfettered discretion to approve any joint operating arrangement between newspapers that he regards as sound in his own conception of the public

¹ The local unions directly affected by this case—locals that are affiliates of member unions of the AFL-CIO—urged the Attorney General to approve the joint operating arrangement at issue here. Nothing we do in this brief is intended to be in conflict with or to put into question the positions taken by these local unions.

interest. In the context of the Act, the function of the statutory phrase "in probable danger of financial failure" is to delimit the scope of the Attorney General's authority to approve joint operating arrangements between newspapers. The Act does not in express terms delegate to the Attorney General the task of resolving the meaning of these statutory words. The threshold question here, then, is whether it should be *inferred* that Congress intended such a delegation. Only if such an inference is properly drawn would it be appropriate for a court to defer to the construction given by the Attorney General to the statutory language that serves as a limit on his authority.

It is our submission that this inference may not properly be based solely on the fact that Congress has made a delegation of substantive authority to an agency; a delegation of substantive authority to an agency does not carry with it an inference that Congress also intended that the agency be delegated the authority to determine the limits of its own authority.

To the contrary, as we develop in some detail, the basic principles and traditions of our system point to the opposite inference. The line between what has been delegated to an agency and what has not been delegated is of critical importance to the rule of law. It marks the difference between faithful execution of a statute by an agency of the Executive and unauthorized arrogation of power by that agency. It has not been the practice of Congress to grant agencies of the Executive Branch the task of resolving the limits of their own authority. Indeed, as our constitutional scheme envisions, Congress consistently has relied upon the courts as guardians against unauthorized claims of power by the Executive Branch. Where the limits of a statutory delegation to an agency are at issue, there is no alternative, consistent with the premises of our tri-partite system of government, to *de novo* resolution by courts of the proper scope of the legislative delegation to an Executive agency.

ARGUMENT

1. On its face, the Newspaper Preservation Act, 15 U.S.C. §§ 1801, *et seq.*, delegates a limited authority to the Attorney General to reconcile competing interests: on the one hand, the interest in economic competition furthered by the antitrust laws, and on the other hand, the interest in preservation of a diversity of news sources and editorial views. This grant of authority is in the form of a power given to the Attorney General to exempt certain joint operating arrangements between competing newspapers from the proscriptions of the antitrust laws.

The plain language of the Act most assuredly does *not* grant the Attorney General an unfettered discretion to approve any joint operating arrangement between newspapers that he regards to be sound on his own conception of the public interest. Rather, the Attorney General may *only* grant an antitrust exemption to a joint operating arrangement between newspapers if "the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper" 15 U.S.C. § 1803(b). The Act defines "failing newspaper" as one "in probable danger of financial failure." 15 U.S.C. § 1802(5).

The effect of the statutory phrase "in probable danger of financial failure" is thus to delimit the scope of the Attorney General's authority to approve joint operating arrangements between newspapers: no matter what else is true, the Attorney General can only grant an exemption to a joint operating arrangement if *at most one* of the participating newspapers is *not* "in probable danger of financial failure." "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Stark v. Wickard*, 321 U.S. 288, 309 (1944) (footnote omitted).

Accordingly, the meaning of the statutory phrase at issue here presents a classic question of statutory interpretation. Congress expressly stated in positive law the intent to limit the Attorney General's discretion to grant exemptions to a class consisting of less than all newspaper joint operating arrangements. Equally to the point, Congress did *not* state that the Attorney General is delegated the task of resolving the meaning of the statutory words—"in probable danger of financial failure"—that define the limitation on Congress' delegation to the Attorney General. The language is set forth in the Act's "Definitions" provision, and there is nothing in the Act, or in any other statute, expressing a congressional intent to delegate to the Attorney General the task of resolving the meaning of those statutory words.

The threshold question here, then, is whether it should be inferred that Congress intended such a delegation—in effect, a delegation to the Attorney General to determine the limits of his own statutory authority. Only if such an inference is properly drawn would it be appropriate for a court to defer—as the court below did—to the construction given by the Attorney General to the statutory language limiting his authority.

The court below apparently drew such an inference solely on the basis that the scheme Congress crafted to implement the Act relies upon an administrator and on judicial review of the administrator's actions rather than on private causes of action to be adjudicated in the district courts. The inference indulged by the court below necessarily implies that whenever Congress delegates a body of authority to an agency, Congress should be understood, absent an explicit direction to the contrary, to have in addition delegated to that agency the task of determining the limits of the authority granted by Congress to the agency.

It is our submission that a delegation of substantive authority to an agency does not carry with it an inference

that Congress also intended that the agency be delegated the authority to determine the limits of its own authority.

2. In its early administrative law cases this Court had no difficulty with the question posed here. As Justice Frankfurter put the point for the Court in *Addison v. Holly Hill Fruit Products Co.*, 322 U.S. 607, 616 (1944): "The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested." Again, in *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946), the Court stated: "An agency may not finally decide the limits of its statutory power. That is a judicial function."²

The rationale of these cases is straightforward and compelling:

[A]n article III court must exercise independent judgment concerning all questions of law that it is called upon to decide. Separation-of-powers values call for this conclusion, and sometimes emphatically so. Especially when an agency's decision of law defines its own jurisdiction, a judicial check is necessary to prevent self-aggrandizement, arbitrariness, or pursuit of a political agenda not authorized by law. [Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 973, 983 (1988) (emphasis added; footnote omitted).]

Professor Sunstein has stated this rationale in particularly pithy terms:

This principle is a very familiar one. The idea is that those who are limited in their authority by law should not be the judge of those limits. Administrative agencies are constrained by statute, that is, law, and the mere fact that the statute is ambiguous shouldn't give the agency, of all people, the authority

² See also, e.g., *Batterton v. Francis*, 432 U.S. 416, 424-25 & n.8 (1977); *East Texas Lines v. Frozen Food Exp.*, 351 U.S. 49, 54 (1956); *Federal Radio Com. v. Nelson Bros. B&M Co.*, 289 U.S. 266, 276 (1933).

to decide on the meaning of the limitation. The cute way in which it's sometimes put is that foxes shouldn't guard henhouses. [*Judicial Review of Administrative Action in a Conservative Era*, 39 Admin. L. Rev. 353, 368 (1987) (remarks of Professor Cass Sunstein at panel discussion, Oct. 10, 1986).]

Recent cases, however, have left the state of the law on this issue less than clear. See *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, — U.S. —, 108 S. Ct. 2428, 2443-44 (1988) (Scalia, J., concurring) ("rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction"); *id.* at 2446-47 (Brennan, J., dissenting) (courts should not defer to agency interpretation of statute confining agency's own jurisdiction).

3. In his concurring opinion in *Mississippi Power & Light*, 108 S. Ct. at 2444, Justice Scalia stated the argument for inferring presumptively a congressional intent to delegate to an agency the task of determining the limits of the grant of authority to the agency:

Deference is appropriate because it is consistent with the general rationale for deference: Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction. [Emphasis in original.]

Justice Scalia's recognition that it is Congress' "expect[ations]" that are controlling in this regard is, of course, unimpeachable. Where a statute states a legal rule and does not settle in so many words subsidiary questions concerning the rule's implementation—including the question of whom Congress expected to be responsible for resolving particular subsidiary questions—those subsidiary questions are to be answered on the basis of the ascertainable evidence of Congress' intent. This principle has long been recognized by this Court and has most recently been explicated in the "implied cause of action" cases. As the Court stated earlier this year:

[Whether] a cause of action to enforce a [federal statutory duty] should be implied . . . poses an is-

sue of statutory construction: The "ultimate issue is whether Congress intended to create a private cause of action." *California v. Sierra Club*, 451 U.S. 287, 293 (1981); see also *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979). Unless such "congressional intent can be inferred from the language of the statute, the statutory structure, or from some other source, the essential predicate for implication of a private remedy simply does not exist." *Thompson v. Thompson*, 484 U.S. 174 (1988). [*Karahalios v. National Federation of Federal Employees*, — U.S. —, 109 S. Ct. 1282, 1286 (1989).]

By the same token, the question of the relative roles of the Attorney General and the courts in implementing and interpreting the Newspaper Preservation Act is a question of statutory construction in which the ultimate issue is Congress' intent.

At this early point, however, we must part company with Justice Scalia. With all due respect, it would not be "natural" for Congress to expect that, absent an express delegation, an agency will be responsible for determining the scope of a limitation Congress has placed on the agency's own authority. All the relevant materials cut the other way.

4. a. The starting point is that, at least with regard to purely domestic economic and social issues, the policies of the United States are arrived at through legislative enactments, not through unilateral determinations made by the Executive Branch. That is the essence of Article I's grant: "All legislative Powers herein granted shall be vested in a Congress of the United States." As this Court has held: "[I]t is . . . emphatically . . . the exclusive province of the Congress not only to formulate legislative policies and programs and projects, but also to establish their relative priority for the Nation." *TVA v. Hill*, 437 U.S. 153, 194 (1978).

Where Congress has entered a field and delegated a portion of the policy-making function to an Executive

Branch agency or officer, the Executive is not thereby empowered to make independent determinations of the law or of the policy of the United States. The laws that the Executive is commanded by Article II to "faithfully execute[]" are the laws enacted by Congress. In *Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952), the Court succinctly stated the point:

[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

More recently, Justice Rehnquist (as he then was) in an opinion for a unanimous Court added:

The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes. [*Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).]

Indeed, Congress as a matter of practice does not—and as a matter of constitutional law may not—grant unlimited policymaking authority to any agency of the Executive Branch. See *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 342 (1974); *Schechter Corp. v. United States*, 295 U.S. 495, 529-30 (1935). See also *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 672-75 (1980) (Rehnquist, J., concurring).

Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), we have been equally clear about the federal judicial role in the construction of federal legislative

enactments: "It is emphatically the province and duty of the judicial department to say what the law is." The judicial task in this regard is, in its most basic terms, to ascertain the will of Congress that is manifested in the statutory language at issue in a case.

Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. [*TVA v. Hill*, 437 U.S. at 194. See also *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 98 (1981).]

The foregoing is not a mere miscellany of rules; the truths we have just canvassed are the corollaries of the basic principles of limited powers and of checks and balances that animate the entire constitutional structure. As this Court has stated: "The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'" *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). In particular, "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." *Bowsher*, 478 U.S. at 722 (quoting *The Federalist* No. 47 (Madison)).

Additionally, as Madison explained:

[T]he greatest security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. [*The Federalist* No. 51, 349 (J. Cooke ed. 1961).]

See also *Mistretta v. United States* — U.S. —, 109 S.Ct. 647, 659 (1989); *Buckley v. Valeo*, 424 U.S. 1, 122-23 (1976); *Morrison v. Olson*, — U.S. —, 108 S.Ct. 2597, 2623 (1988) (Scalia, J., dissenting); see also *Public Citizen v. Department of Justice*, — U.S. —, 57 U.S.L.W. 4793, 4801 (June 21, 1989) (Kennedy, J., concurring).

b. It is within this framework for the making, elaborating and administering of federal law that what Justice Scalia terms "the general rationale for deference" to agency determinations must be understood.

The evolution of the modern administrative state has complicated the interaction of the three branches of the federal government, but has not compromised the integrity of the role each branch is to play in the constitutional scheme. The complexity of our present society has made it increasingly impracticable for Congress to enact fully realized statutory solutions to many of the nation's most pressing problems. The need to address a growing number of problems with a combination of technical expertise and the flexibility to meet rapidly changing conditions has pushed Congress to delegate, through duly enacted legislation, a significant degree of the policy-making function to agencies of the Executive Branch. *Mistretta*, 109 S.Ct. at 654. Often, such delegations include authority to "fill in the blanks" of generally stated statutory policies with more specific agency policy determinations. *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. at 675 (Rehnquist J., concurring). See also, e.g., *Mistretta*, 109 S.Ct. at 655 (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)) ("this Court has deemed it constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority").

Where Congress has delegated to an agency this power to make policy, subjected the agency's authority to stated limits and provided for judicial review of agency actions, the question becomes by what standards courts should review the agency's exercise of that delegated power.

This Court has concluded that the first governing rule in this class of cases is that such decisions by agencies, "*within the limits of [Congress'] delegation,*" are in essence policy choices by a politically accountable branch and thus should receive deference from the courts. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 865 (1984) (emphasis added). This rule, we agree, constitutes a fair inference as to Congress' intent. The failure of courts to defer to agency policy decisions as to matters that Congress *intended* to delegate to the agency would be totally at odds with the choice that Congress has made and frustrate the achievement of the decision-making scheme Congress so plainly envisaged: *viz.*, that certain decisions be made by decision-makers who act with a background of expertise and, depending on the nature of the agency, at least some degree of political accountability.

This rationale for judicial deference, however, *cannot* be stretched to justify judicial deference on the distinct question of the scope of the delegation made to an agency. At the outset, it is understatement to say that an agency has no claim to judicial deference as to decisions "[outside] the limits of [Congress'] delegation." *Id.* Indeed, an agency has no authority to make such decisions at all. An agency has no more right than a court to make policy decisions with respect to matters not delegated to the agency. The line between what has been delegated and what has not thus becomes of critical importance to the rule of law. It marks the difference between faithful execution of a statute by an agency of the Executive and unauthorized arrogation of power by that agency.

The process of locating that line, moreover, has none of the characteristics of a function that in the normal course is delegated by Congress to Executive agencies. Resolution of the boundaries of a statutory delegation of authority is not interstitial policymaking, nor does it call for the exercise of politically accountable power. Rather, resolution of such a question calls for the detachment from the political process and the background in determining the legislative will that are the hallmarks of the judicial authority. What is required is no more—and no less—than what is at the core of the judicial function: ascertainment of the will of Congress as manifested in particular statutory language.

It is, accordingly, not surprising that this Court has repeatedly found it appropriate to determine, on a *de novo* basis, the meaning of substantive statutory terms that affect the scope of an agency's delegated authority. *See, e.g., Board of Governors, FRS v. Dimension Financial Corp.*, 474 U.S. 361 (1986) (Federal Reserve Board overstepped its authority when it extended its regulations to "non-bank banks"); *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. at 645 (plurality opinion) (1980) (rejecting Secretary of Labor's interpretation of substantive standards in the Occupational Health and Safety Act, because "[i]n the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view"); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971) (Court required to decide whether Secretary properly construed his authority); *Packard Co. v. Labor Board*, 330 U.S. 485, 493 (1947) (Court made *de novo* inquiry into meaning of statute, stating "[w]e are not at liberty to be governed by . . . policy considerations in deciding the naked question whether the Board is now . . . acting within the terms of the statute").

Similarly, in this case the operative question is at bottom what Congress intended by the words "in probable danger of financial failure." That is a question of statutory interpretation, not of policy, a question answerable by application of time-honored judicial methods of statutory construction. "[W]hile informed judicial determination is dependent upon enlightenment gained from administrative experience, in the last analysis the words [of the statute] set forth a legal standard and they must get their final meaning from judicial construction." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). Thus, even where judicial review is "of a judgment as to the proper balance to be struck between conflicting interests, '[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in an unauthorized assumption by an agency of major policy decisions properly made by Congress.'" *NLRB v. Brown*, 380 U.S. 278, 292 (1965) (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965)).³

Nor does the fact that the answer to a question of statutory construction may not be easy or obvious change the basic nature of the judicial task. The judicial responsibility to construe statutes is not limited to easy cases. As Professor Monaghan has put it:

I must confess that I have never understood why judicial doubt should produce a conclusion of deference. The argument from the comparative expertise

³ As Justice Jackson noted in *SEC v. Chenery Corp.*, 332 U.S. 194, 215 (1947) (Jackson, J., dissenting):

I suggest that administrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the Commission in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And what action is, and what is not, within the law must be determined by courts, when authorized to review, no matter how much deference is due to the agency's fact finding.

See also Fallon, 101 Harv. L. Rev. at 985-86 & n.377.

of the agency seems to me no stronger here than elsewhere. . . . More importantly, to the extent that the deference suggestion is grounded upon a general no-right-answer epistemology, it encounters fundamental systemic difficulties. Ex ante it may be that no one conclusion as to what a statute means is ineluctable. Nonetheless there is, in our system, no room for the Scottish verdict of "not proved" on questions of law: The presupposition of the entire legal system is that the court must choose and what it chooses is correct. Thus the Court, for example, continuously chooses between plausible statutory interpretations. The cases in which courts defer in the face of uncertainty must be understood as simply delegations to the agency of a norm-elaboration function. [Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 30 n.177 (1983).]⁴

The last point in the quoted passage bears emphasis. When the statutory issue is the interpretation of a statutory limitation on a delegation to an agency, to "defer in the face of uncertainty" is to effect a delegation: a delegation to the agency to decide the limits of its delegated authority.

c. In the light of the principles thus far established, Justice Scalia's hypothesis as to what Congress would "naturally expect" does not withstand scrutiny.

It is not the norm in our system to give an entity of the Executive Branch the power to determine its own authority. The operating premise of our constitutional

⁴ "The principle that deference depends on congressional delegation does not . . . lead inexorably to the conclusion that statutory ambiguity alone establishes such a delegation." Note, *Coring the Seedless Grape: A Reinterpretation of Chevron U.S.A. Inc. v. NRDC*, 87 Colum. L. Rev. 986, 995 (1987). See also Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 467 (1987) ("The fact that a statute can be read in different ways does not mean that Congress intended the agency to resolve the question.").

system has always been directly to the contrary. Madison's statement of the theory of checks and balances has been heeded in practice as well as in constitutional adjudication. In the process of delegating a limited authority to an agency to implement and elaborate the law, it is natural for Congress to look to the Judicial Branch, which has no institutional stake in the allocation of powers between the Executive Branch and the Legislative Branch, to police the boundaries of the delegation. In fact, Congress consistently has relied upon the courts as the guardians against unauthorized claims of power by the Executive Branch. That is the very premise of the Administrative Procedure Act:

To the extent necessary to decision and when presented, the reviewing court shall *decide* all relevant questions of law, *interpret* constitutional and *statutory provisions*, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. [5 U.S.C. § 706 (emphasis added).]⁵

Indeed, judicial enforcement of the limits of statutory delegations of authority to agencies is the touchstone of this Court's jurisprudence respecting the constitutional requirements for valid delegations. To be valid at all, delegations by Congress to Executive Branch agencies must be made with sufficient statutory standards for courts to be able to determine whether the agency is

⁵ See also Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 471-75 (1989); Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 U. Va. L. Rev. 271, 289 (1986); Note, *Coring the Seedless Grape*, 87 Colum. L. Rev. at 995. Cf. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (Congress' intent in passing the APA was to require reviewing courts to scrutinize agency action more stringently).

acting within the scope of the delegated authority. As Justice Rehnquist stated, in his concurring opinion in *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. at 686, the nondelegation doctrine "ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." See also *Mistretta v. United States*, 109 S.Ct. at 658; *American Power & Light Co. v. SEC*, 329 U.S. 90, 105-06 (1946); *Yakus v. United States*, 321 U.S. 414, 425-426 (1944); *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part).⁶

Against this background, to infer as a general rule that Congress would "naturally expect" agencies to have the power to determine the limits of their own authority runs against the grain of the premises of our system. The initial conception of our constitutional scheme, and the evolution of that scheme in practice, lead to just the opposite inference: Congress would expect courts not to defer to an agency decision respecting the scope of authority delegated to the agency.⁷

⁶ "Congress has been willing to delegate its legislative powers broadly—and the courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits." *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir.) (*en banc*) (Leventhal, J., concurring) (footnote omitted), *cert. denied*, 426 U.S. 941 (1976). See also Farina, 89 Colum. L. Rev. at 485-99 (1989) (canvassing the Court's historical rationale for the delegation doctrine, and the Framers' understanding of checks and balances, and concluding that the development of the modern administrative state through Congressional delegation "can be reconciled with separation of powers principles if, but only if, the new concentration of power is offset by correlative checks").

⁷ See Sunstein, 101 Harv. L. Rev. at 467; Farina, 89 Colum. L. Rev. at 468-76.

Where Congress intends the agency to be the primary interpretive body, Congress knows how to make such an intent explicit. For example, because of the "Byzantine construction" of the Social Security Act, 42 U.S.C. § 301 *et seq.*, "Congress conferred on the Secretary [of Health and Human Services] exceptionally

d. If the inference were otherwise, the practical implications for the law-making process would be profound. The reality is that there are limits to the precision that can be achieved through statutory language. If an imprecision in statutory language relating to a grant of authority may be a license to an agency to aggrandize power, Congress would have to consider whether in any given instance this risk of legislating is out of proportion to the gain. At the least, under such a regime, were Congress to undertake to allocate power to an agency sparingly, it would do so with the hazard that its efforts might be frustrated by the very agency Congress was seeking to limit. These are costs that our constitutional system was designed to avoid through the mechanism of *de novo* judicial consideration of Congress' intent as to the limits of agency authority.

5. To this point, for the sake of clear exposition, we have proceeded as if questions of the limits of agency authority and questions of review of agency policy decisions are readily distinguishable. We do not, however, underestimate the difficulty of the judicial role in sepa-

broad authority to prescribe standards for applying certain sections of the Act." *Schweiker v. Gray Panthers*, 453 U.S. 34, 43-44 (1981). Thus, in 42 U.S.C. § 607(a), Congress "expressly delegated to the Secretary the power to prescribe standards for determining what constitutes 'unemployment' for purposes of AFDC-UF eligibility." *Batterton v. Francis*, 432 U.S. 416, 425 (1977) (emphasis in original). The pertinent part of section 607(a) required a participating state to provide assistance where a needy child "has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of the father." *Id.* at 419 (emphasis added).

See also *Schweiker v. Gray Panthers*, 453 U.S. at 43-44 (Secretary has been delegated "substantive authority" under 42 U.S.C. § 1396a(a)(17)(B), which provides that states must grant Medicare benefits to eligible persons "taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant" (emphasis supplied by the Court)).

rating out these questions. The line between what is a legal question and what is a policy question, what was intended for the courts and what for the agency, will frequently be hazy. And we are quick to acknowledge that it is just as wrong for courts to overplay their hand as to underplay it. The sorting-out process will require in every case a delicate sensitivity to the various aspects of congressional intention that may inhere in a single administrative delegation. But, in the end, where the limits of a statutory delegation to an agency are at issue, there is no alternative, consistent with the premises of our tri-partite system of government, to *de novo* resolution by the courts of the proper scope of the legislative delegation to an Executive Branch agency.

CONCLUSION

For the foregoing reasons, the Court should: (1) ascertain by the normal methods of statutory construction whether Congress intended to delegate to the Attorney General the task of resolving the meaning of the statutory limitation on his jurisdiction; and, if the Court finds Congress did not have that intention, (2) interpret the statutory language at issue in this case—"in probable danger of financial failure"—according to the Court's best judgment of the intent of Congress, using all the materials normally brought to bear by a court on such a question of statutory construction.

Respectfully submitted,

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